Mar 9 2000

Supreme Court, U.S.
FILED
MAR - 9 2000
CLERK

No. 99-5525

In The

Supreme Court of the United States

CHARLES THOMAS DICKERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICUS CURIAE* MANNING & MARDER, KASS, ELLROD, RAMIREZ IN SUPPORT OF THE JUDGMENT BELOW

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INTEREST OF *AMICUS CURIAE*

The law firm of Manning & Marder, Kass, Ellrod, Ramirez specializes in the representation of law enforcement agencies and individual law enforcement officers. Many of our cases involve questions of the extent to which conduct by law enforcement officers does, or does not, infringe core constitutional protections. It is vital that the individual officers, their employing agencies, trainers and advisors represented by this firm have a clear and unmistakable resolution of the question that is now presented for decision in this Court.[1]

SUMMARY OF ARGUMENT

1. The supposed "bright line" rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), often reflexively proffered as a justification for a judicially-created exclusionary rule that routinely conceals voluntary and reliable confessions from juries seeking the truth, never has, in fact, existed. Thirty-four years of experience with *Miranda* has revealed its contours to be unworkably amorphous and unpredictable, and incapable of sustaining the false advertising of its alleged "clarity" and "ease of application."

2. Contrary to its great expectations, the *Miranda* decision has not simplified admissibility determinations

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

by obviating the need for case-specific voluntariness determinations under the Due Process Clauses. Instead, *Miranda* has complicated and burdened the process by adding an additional layer of issues to be litigated (custody, interrogation, warning, waiver, invocation, reinitiation, etc.), after which traditional voluntariness issues still must be addressed. The case-specific analysis provided by 18 U.S.C. Section 3501 is a far more sensible and efficient approach to determining confession admissibility.

3. One after another, cases and assertions upon which *Miranda* relied for its *ratio decidendi* have been rejected by subsequent decisions of this Court. Like an old sacrificial shrine sunk into the mud after the collapse of its foundation, *Miranda* retains its authority only from inertia, revered despite its obvious ineffectiveness. Inertia cannot justify the constitutional enshrinement of a decision that has failed to meet its stated goals – particularly when an Act of Congress provides a superior means of preventing testimonial use of coerced confessions, while permitting voluntary statements to be disclosed to the jury.

4. Public confidence in the Court and in the rule of law does not require overruling Section 3501. On the contrary, public confidence in the rule of law is enhanced by upholding a statute enacted by the popularly elected branch of the government, the United States Congress. The express will of the branch of government accountable to the public at the ballot box is entitled to respect and should be upheld.

ARGUMENT

1. The Fictional "Bright Line" of *Miranda* Is No Bright Line at All.

In *Miranda*, 384 U.S. at 442, the Court optimistically claimed to be giving "concrete constitutional guidelines for law enforcement agencies and courts to follow." In fact, however, the rules and exceptions to the *Miranda* theory are no better understood by police or judges today than they were in 1966.

Miranda has become this Court's most litigated case. In more than three dozen decisions construing *Miranda* over the past thirty-four years, this Court has reversed lower courts 86% of the time, overruling the misinterpretations of nine federal appellate courts, as well as the highest courts of sixteen states. This extraordinary litigation record is the most compelling proof that *Miranda's* attempt to fashion a workable "bright line" has been a dismal and costly failure.

Though the procedure recommended in *Miranda* is deceptively simple if summarized as "the administration of warnings prior to custodial interrogation," the multitude of determinations police officers and judges must make in practical application has exposed the complex, changing and uncertain nature of *Miranda*.

What, for example, is "custody"? The Court has addressed this question nine times since *Miranda*, reversing lower courts' interpretations seven times. As recently as 1994 – twenty-eight years after the "concrete guidelines" were first announced – the Court unanimously reversed the California Supreme Court (one of the

nation's most respected), which still did not understand the definition. *Stansbury v. California*, 511 U.S. 318 (1994). After nearly three decades of dealing with *Miranda*, the highest court of the largest state had not yet discerned the "bright line" concept of "custody" – but law enforcement officers and trial judges are expected to have no difficulty in identifying the point at which this *Miranda* threshold occurs?

The Court has conceded that "the task of defining 'custody' is a slippery one," and has recognized that "[p]olice officers are ill-equipped to pinch-hit for counsel, construing the murky and difficult questions of when 'custody' begins. . . . " *Oregon v. Elstad*, 470 U.S. 298, 309, 316 (1985). This acknowledgment belies the facile claim of *Miranda's* "ease of application." "Slippery," "murky," and "difficult" are hardly the attributes of a "bright line."

And what exactly constitutes *Miranda's* second trigger – "interrogation"? The Court has wrestled with this term four times, each time reversing the lower court. And in *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), a badly-fractured court produced six different opinions as to which portions of an officer's drunk-driving investigation did or did not involve "interrogation." Ultimately, the Court was unable to agree on any opinion as to the admissibility of certain booking responses. When, after twenty-four years of consideration, the members of this Court cannot agree on the definition of interrogation, what "bright line" exists to guide the actions of law enforcement officers in the field, or to guide lower court judges reviewing their actions?

On questions relating to warning, waiver and invocation, the Court has issued eleven opinions, including ten reversals. The still-confusing rules on permissible reinitiation of questioning have been the subject of six opinions (five reversals), but continue to confound police: After a suspect's *Miranda* invocation of *silence*, reinitiation of questioning is permissible as to a *different* offense, *Michigan v. Mosely*, 423 U.S. 96 (1975); but after invocation of *counsel*, police may not reapproach on the same case, *Edwards v. Arizona*, 451 U.S. 477 (1981), nor on a different case, *Arizona v. Roberson*, 486 U.S. 675 (1988) – even if the lawyer requested on the *first* case has been provided. *Minnick v. Mississippi*, 498 U.S. 146 (1990) (leaving unanswered the question of whether such invocation bars reinitiation indefinitely, as where a person remains continuously in custody after invocation of counsel and commits a crime in prison years – or decades – later). The *suspect* may reinitiate, *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) – provided officers correctly perceive the suspect's question or statement as inviting renewed interrogation.

In practice, these complex rules on reinitiation require any officer other than the arresting officer to take an "interrogation history" from the suspect to determine whether interrogation may even be attempted, and if so, on what topics. Detectives and other follow-up officers must know the following: (1) Has the suspect been Mirandized? (2) If so, did he waive? (3) If not, did he invoke only *silence*, or (4) Did he ask for *counsel*? (5) After either invocation, has the suspect reinitiated and waived the right previously asserted? Of course, an entirely different set of rules apply to assertion and waiver of the *Sixth* Amendment right to counsel, which, unlike *Miranda*, is

offense-specific, and independent of custody. Officers, therefore, must be familiar with the line of cases applying *Massiah v. United States*, 377 U.S. 201 (1964), and especially those decisions distinguishing the separate *Miranda* rules, such as *Moran v. Burbine*, 475 U.S. 412 (1986), *Michigan v. Jackson*, 475 U.S. 625 (1986), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991). Clarity? Ease of application? Bright line? Or unworkable convolution?

On the subject of the exclusionary consequences of an officer's failure to correctly anticipate or discern and follow *Miranda's* serpentine guidelines, this Court has issued seven opinions (six reversals). Although holding that voluntary statements lacking *Miranda* conformity are admissible for impeachment, *Harris v. New York*, 401 U.S. 222 (1971) and *Oregon v. Hass*, 420 U.S. 714 (1975), and ruling that a witness revealed in an inadmissible statement may testify, *Michigan v. Tucker*, 417 U.S. 433 (1974), the Court has yet to resolve the constant issue of whether physical evidence disclosed in a noncomplying statement is admissible.

So, is there truly a "bright line" that helps to justify a decision which even the courts at all levels cannot consistently interpret? Do police officers really have "concrete guidelines" that they can reliably apply to the many interrogation issues they confront each day in the field and in the station house? The Court itself has supplied the obvious answer to these questions: "In many cases, a breach of *Miranda* procedures may not be identified as such until long after full Miranda warnings are administered and a valid confession obtained." *Oregon v. Elstad*, 470 U.S. at 316.

Since *Miranda's* line is so blurry that transgressions may not be identifiable until long after the interrogation has occurred, it follows indisputably that *Miranda* has not proven workable. The case-specific voluntariness test of Section 3501, by contrast, does not raise the plethora of "slippery" and "murky" issues associated with *Miranda*. The statute's line is far brighter, easier to apply and more likely to accomplish the twin goals of excluding statements that are actually (not just presumptively) compelled, while admitting statements found on consideration of the statutory factors to have been made voluntarily.

2. *Miranda* Is Not a Substitute for the Voluntariness Inquiry, but an Additional Inquiry, Requiring Additional Litigation.

In *Miranda*, 384 U.S. at 457, the Court admitted that in the cases before it, "we might not find the defendants' statements to have been involuntary in traditional terms." In other words, the new *Miranda* test would be a separate, independent test, that might cause suppression of statements that were in no way involuntary. The Court repeatedly has acknowledged as much: "[P]atently *voluntary* statements taken in violation of *Miranda* must be excluded from the prosecution's case. . . . " *Oregon v. Elstad*, 470 U.S. at 307; "Although recognizing that the *Miranda* rules would result in the exclusion of some voluntary and reliable statements," the Court imposed the additional test anyway. *Michigan v. Harvey*, 494 U.S. 344, 350 (1990).

As with the invisible "bright line" discussed above, there has been an attempt to justify *Miranda* on the false assertion that *Miranda* generally guarantees voluntariness, and therefore eliminates the need to make the traditional voluntariness inquiry. One of the purposes of *Miranda* was "as much as possible to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary." *Berkemer v. McCarty*, 468 U.S. 420, 433 (1984).

This purpose has never been, and can never be, accomplished, for "the failure to provide Miranda warnings in and of itself does not render a confession involuntary." *New York v. Quarles*, 467 U.S. 649, 655, fn. 5 (1984). On the other hand, compliance with *Miranda* does not guarantee voluntariness, because in situations where a warning and waiver occur, police officers may still employ coercive tactics (such as mistreatment, threats, or promises) that render the Mirandized statement involuntary.

The Court has recognized that in addition to *Miranda* litigation, trial courts also must litigate voluntariness challenges (which, in practice, defendants routinely couple with *Miranda* challenges): "[I]n situations that fall outside the sweep of the *Miranda* presumption, 'the primary criterion of admissibility [remains] the "old" due process voluntariness test.' " *Oregon v. Elstad*, 470 U.S. at 307-08; even after *Miranda*, "the Court has continued to measure confessions against the requirements of due process." *Miller v. Fenton*, 474 U.S. 104, 110 (1985); "Indeed, we continue to employ the totality-of-circumstances approach when addressing a claim that the introduction of an involuntary confession has violated due process."

Withrow v. Williams, 507 U.S. 680, 689 (1993); *accord, Colorado v. Connelly*, 479 U.S. 157, 163 (1986), in which this Court engaged in the two-part analysis now necessitated to resolve both the *Miranda* issues and the due process voluntariness issues.

Miranda has in fact not eliminated the need for traditional due process review. It has merely added to the burden on law enforcement, counsel and courts to determine admissibility of statements. The fiction that *Miranda* reduces litigation and saves judicial resources cannot legitimately be used to justify an unwarranted exclusionary rule that frequently results in the suppression of "the most probative and damaging evidence that can be admitted against [the defendant]." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (citations omitted).

Section 3501 more sensibly eliminates the double litigation burden of two hearings. More importantly, the statute provides a consolidated examination of both the components of *Miranda* and the traditional voluntariness factors of due process. This more efficient procedure assures that coerced confessions will not be used, while permitting use of truly voluntary statements. The statute accomplishes what *Miranda* cannot, and does so without *Miranda's* costly and unjustifiable suppression of highly probative, reliable and voluntary evidence of the truth.

Section 3501 protects a suspect's assertion of his right to silence or counsel, while permitting a trial judge to consider all of the enumerated factors in determining admissibility of statements, including the time between arrest and arraignment, the suspect's understanding of the nature of the offense, whether the suspect knew he

was not required to make any statement, whether the suspect had been advised of his right to counsel, and whether the suspect had the assistance of counsel at the time the statement was made. 18 U.S.C. § 3501(b). If, for example, a particular suspect was not cautioned of his rights in a timely fashion, but evidence showed many prior arrests where the suspect had been admonished and had variously waived or asserted his rights and was therefore quite familiar with them, his otherwise voluntary statement need not necessarily be lost to the fact-finder by technical default, as has often been the case under *Miranda*.

"[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Excluding voluntary statements by a judicial presumption that has never been supported by empirical facts tends to "deflect a criminal trial from its basic purpose." *Colorado v. Connelly*, 479 U.S. at 166. *Miranda's* high costs in the search for the truth cannot be justified by the claim that it reduces litigation and simplifies admissibility determinations – it does neither. In contrast, Section 3501 does in fact reduce litigation and allow the uncoerced truth to be presented to the jury. No rational objective, therefore, is served by inertial preference for *Miranda's* anachronistic scheme over a legislative alternative that more efficiently protects constitutional rights and facilitates – rather than thwarts – the search for the truth. "We are, after all, always engaged in a search for truth in a criminal case. . . . " *Oregon v. Hass*, 420 U.S. at 722.

3. Assuming *Miranda's* Premises and Conclusions Once Were Supported by Precedent or by Logic, Subsequent Developments Have Revealed *Miranda's* Fallacies.

Invocations of constitutional imperative notwithstanding, *Miranda* was essentially the assumption of five members of the Court – unsupported by any empirical evidence – that custodial interrogation was by its nature coerced interrogation. So much so that the privilege against compelling a defendant to testify at trial necessarily was implicated by questioning a suspect in custody. The warning and waiver procedure then approved was assumed to dissipate the coercion, serving as a prerequisite to admission of statements.

With all due respect for the good intentions of the *Miranda* opinion, the kindest thing to be said of the rationale and purported justifications for that revolutionary departure from nearly two hundred years of Fifth Amendment jurisprudence is that the rambling, sixty-page opinion did not provide cogent support for its holding. During the thirty-four years of *Miranda's* existence, virtually every brick of *Miranda's* foundation has crumbled or been removed. A few examples will suffice to illustrate that *Miranda* has not withstood the test of time or met the demands of practicality.

Miranda's analytical starting point was the earlier holding in *Escobedo v. Illinois*, 378 U.S. 478 (1964) – a *Sixth* Amendment case. *Miranda v. Arizona*, 384 U.S. at 440-442. After a "thorough re-examination" of the two-year-old *Escobedo* decision, the Court declared, "we reaffirm it." *Ibid.* While building on a "reaffirmed" *Escobedo* may have

been convenient and necessary to help shore up *Miranda's* ruling, the Court, strangely enough, limited *Escobedo* to its own facts just one week later in *Johnson v. New Jersey*, 384 U.S. 719, 733-34 (1966). The Court has since declined to honor *Escobedo* as precedent for any proposition: "[T]he Court has limited *Escobedo* to its own facts. . . . " *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). *Miranda's* discussion of *Escobedo* "is not only dictum, but reflects an understanding of the case that the Court has expressly disavowed." *Moran v. Burbine*, 475 U.S. at 430. So much for *Miranda's* reliance on *Escobedo*.

While purporting to find textual and historical authority for its Fifth Amendment holding, *Miranda* instead leaned almost exclusively on *Fourteenth* Amendment due process cases coming from the states, *e.g.*, *Blackburn v. Alabama*, 361 U.S. 199 (1960), *Townsend v. Sain*, 372 U.S. 293 (1962), *overruled by Keeny v. Tamayo-Reyes*, 504 U.S. 1 (1992), *Lynumn v. Illinois*, 372 U.S. 528 (1963), *Haynes v. Washington*, 373 U.S. 503 (1963), *Chambers v. Florida*, 309 U.S. 227 (1940), and *Ashcraft v. Tennessee*, 322 U.S. 143 (1944). The Fourteenth Amendment, protecting against actual coercion, provides no support for a Fifth Amendment ruling on presumptive compulsion.

One of the few Fifth Amendment cases cited in *Miranda*, *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), dealt not with custodial interrogations, but with immunized testimony. *Murphy*, moreover, was seriously undercut in *United States v. Balsys*, 524 U.S. 666 (1998). Another Fifth Amendment decision repeatedly cited by *Miranda* was *Bram v. United States*, 168 U.S. 532 (1897). But *Bram's* broad central theme, "which under current precedent

does not state the standard" for confession analysis, *Arizona v. Fulminante*, 499 U.S. at 285, can no longer buttress *Miranda's* extrapolations from it.

Quoting from *Wan v. United States*, 266 U.S. 1 (1924), which in turn had relied on *Bram*, *Miranda* repeated that a compelled confession must be excluded, "whatever may have been the character of the compulsion." *Miranda v. Arizona*, 384 U.S. at 462. But this sweeping rule was pointedly rejected by this Court in *Colorado v. Connelly*, 479 U.S. at 164-67, where the character of the compulsion was a "command hallucination from God" to confess. *Connelly* held that the character of the compulsion was not nearly as broad as "whatever," but must derive from coercive *police* activity. And in *Oregon v. Elstad*, 470 U.S. at 304-05, the Court noted that "The Fifth Amendment, of course, is not concerned with . . . moral and psychological pressures to confess emanating from sources other than official coercion." To the extent that *Bram* may ever have been said to undergird *Miranda*, that claim can no longer be made.

Miranda's footnote 33, 384 U.S. at 464, cites a number of cases for the rule, then extant, that introduction of a coerced confession requires reversal of a conviction, even if there is ample evidence to sustain the judgment. That rule was overturned in *Arizona v. Fulminante*, 499 U.S. 279 (1991).

The *Miranda* Court thought the Fifth Amendment was designed, in part, "to respect the inviolability of the human personality. . . . " *Miranda v. Arizona*, 384 U.S. at 460. But this Court recently stated "[t]he Fifth Amendment tradition, however, offers no such degree of protection," and that "what we find in practice is not the

protection of personal testimonial inviolability. . . . " *United States v. Balsys*, 524 U.S. at 692.

In *Miranda*, the Court ruled that "the Fifth Amendment privilege is available" to be claimed during custodial interrogations. *Miranda v. Arizona*, 384 U.S. at 461, 467. Though this ruling implies that the Fifth Amendment also can be *violated* at interrogations lacking *Miranda* compliance (and numerous lower courts have indeed drawn this conclusion), this Court has since clarified that while police questioning may implicate the Fifth Amendment privilege, "a constitutional violation occurs only at trial." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990).

Miranda referred to the prescribed warnings as "an absolute prerequisite" to custodial interrogation. *Miranda v. Arizona*, 384 U.S. at 468, 471. But in *New York v. Quarles*, 467 U.S. at 654, this Court decided that the "prophylactic" *Miranda* procedures, not themselves being required by the Constitution, were not so absolute after all. The Court made an exception for public safety questioning, and lower courts have relied on *Quarles* to approve exceptions for officer safety questioning, rescue of kidnap victims, and assessing a wounded arrestee's injuries and need for treatment. *E.g.*, *People v. Laliberte*, 615 N.E.2d 813, 816-32 (Ill. App. 1993) (after kidnaper's assertion of rights, FBI agents questioned to rescue one-year-old left in a duffle bag in the woods); *cf.*, *People v. Krom*, 461 N.E.2d 276, 278-79 (N.Y. 1984) (when kidnaper asked for counsel, questioning was delayed, and the victim was later found suffocated in a coffin-like box).

This Court also found *Miranda's* "absolute prerequisite" inapplicable to custodial interrogation conducted by an undercover officer, in *Illinois v. Perkins*, 496 U.S. 292 (1990). *Miranda's* categorical command, a key to its holding, thus has not survived intact.

Also failing preservation were *Miranda's* insistence that any post-warning waiver be "specifically made," and its caution that while an "express statement" might constitute a waiver, no waiver could be presumed from the fact that a confession was eventually obtained. *Miranda v. Arizona*, 384 U.S. at 470, 475. But in *North Carolina v. Butler*, 441 U.S. 369 (1979), this Court held that a waiver need not be express, but could be inferred from the fact that a suspect answered questions after being apprised of his rights.

Miranda declared that upon invocation of the right to silence, interrogation must cease, and that "any statement taken after the person invokes his privilege cannot be other than the product of compulsion. . . . " *Miranda v. Arizona*, 384 U.S. at 473-74. The seemingly unqualified import of these declarations was repudiated in *Michigan v. Mosley*, 423 U.S. at 102, where the Court found that literal application would "transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity. . . . "

The rationale put forward in *Miranda* was premised, in part, on the mistaken notion that custodial interrogation triggered the protections of the Fifth Amendment, because "It is at this point that our adversary system of criminal proceedings commences. . . . " *Miranda v. Arizona*, 384 U.S. at 477. But this statement is at odds with

language from a long line of *Sixth* Amendment cases, holding that adversary criminal proceedings do not commence until formal charging, indictment, information, preliminary hearing or arraignment. Reaching one of these stages – well beyond custodial interrogation – "is the starting point of our whole system of adversary criminal justice." *Kirby v. Illinois*, 406 U.S. at 689.

Although *Miranda* seemed to allow interrogation without warnings only "of persons not under restraint," *Miranda v. Arizona*, 384 U.S. at 477, the Court has subsequently ruled that no warnings need be given to those under the restraint of a temporary detention, not equivalent to formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984).

Another of *Miranda's* rigid exclusionary commands was that without warnings and waiver by the arrestee, "no evidence obtained as a result of interrogation can be used against him." *Miranda v. Arizona*, 384 U.S. at 479. The Court subsequently decided, however, that some evidence obtained by noncomplying interrogation could be used. *Michigan v. Tucker*, 417 U.S. at 450 (testimony of witness discovered through unwarned questioning admissible); *Harris v. New York*, 401 U.S. at 224 (unwarned impeachment statements admissible, because *Miranda's* language barring any use of such evidence "cannot be regarded as controlling").

The *Miranda* Court assumed that its holding would not hamper police investigations of crimes: "[O]ur decision does not in any way preclude police from carrying

out their traditional investigatory functions." *Miranda v. Arizona*, 384 U.S. at 481. This false assertion has been contradicted repeatedly: *New York v. Quarles*, 467 U.S. at 657 (*Miranda* created "procedural safeguards which deter a suspect from responding. . . . "); *Oregon v. Elstad*, 470 U.S. at 309 ("*Miranda* warnings may inhibit persons from giving information. . . . ").

At one point, *Miranda* stated that the existence of independent corroborating evidence was "irrelevant" to the issue of admissibility of unwarned statements. *Miranda v. Arizona*, 384 U.S. at 481, fn. 52. Shortly thereafter, the opinion tries to prop up its decision by comparison with the practices in such countries as Great Britain, Scotland, India and Ceylon – selected nations with a requirement of pre-interrogation advice. *Id.*, at 486-489. But as Justice O'Connor noted in her separate opinion in *Quarles*, "the trend in these other countries is to admit the improperly obtained statements themselves, if nontestimonial evidence later corroborates, in whole or in part, the admission." *New York v. Quarles*, 467 U.S. at 673, fn. 6 (O'Connor, J., concurring and dissenting). In this regard, *Miranda* was internally inconsistent, using those foreign practices that supported its holding, and ignoring those that did not.

These examples show that *Miranda* made numerous analytical errors, relied on cases that did not support its holding, relied on cases that have since been disapproved, and made broad statements this Court has subsequently been unable to embrace in practice. Even if the assumptions and rulings of *Miranda* had some validity in 1966, in 2000 it is not possible to escape the impact of thirty-four years of its demonstrated impracticality, or to

ignore the fact that subsequent developments in the law in more than three dozen cases decided by this Court have revealed the numerous faults of a poorly reasoned opinion.

Miranda's foundation is gone. Continuing to require society to pay the high price of excluding from trials probative, voluntary statements of accused criminals on the basis of a court-created presumption that is not itself constitutionally authorized or required, that has not proven workable, and that complicates admissibility determinations, is to place *stare decisis* in the realm of idolatry.

4. Upholding Section 3501 Will Not Undermine Confidence in the Judicial System.

Even if the quasi-constitutional rationale of the *Miranda* opinion were not already dead and gone, there would be considerable grounds for abandoning it and upholding Section 3501. It is well known that "*stare decisis* is not an inexorable command," and "this is particularly true in constitutional cases." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Consideration in favor of *stare decisis* is at its nadir in cases like this one, "involving procedural and evidentiary rules." *Ibid.* Like the decisions overruled in *Payne*, *Miranda* was decided "by the narrowest of margins, over spirited dissents challenging [its] basic underpinnings." *Id.*, at 828-29.

It has been submitted, however (Government's *certiorari* brief at 36-37, and merits brief at 43-44 and 56-57), that *Miranda* should be maintained because the public's familiarity with the basic notion of "reading a suspect his

rights" would cause a loss of confidence in the justice system and this Court if *Miranda* is modified or overturned. Not true.

It is dubious, to put it mildly, that the public at large has ever accepted the idea that the criminal should go free because the constable has blundered. There is no reason to believe that most members of the public would favor suppressing a suspected bank robber's voluntary statements based on a disputed finding that he was not given *Miranda* warnings at a particular time. More generally, there is no reason to believe that the public would favor *Miranda's* rigid exclusionary rule over the more flexible approach of Section 3501.

There is nothing to support the Government's vague suggestions that "citizen cooperation" and "support" for law enforcement would somehow diminish if Section 3501 were upheld. This certainly is not the view of law enforcement, as shown by the overwhelming support of law enforcement and prosecution agencies for upholding the statute. In general, nothing will be lost to law enforcement by upholding Section 3501, because nothing in the statute prevents or discourages law enforcement agencies from continuing the *Miranda* procedures (or other similar procedures) to the extent they are found to be beneficial. If law enforcement agencies wish to follow this procedure hereafter – in order to maintain public confidence or to contribute to a finding of voluntariness of statements – they remain perfectly free to do so. As the Court noted on another *Miranda* issue, "the police do not need our assistance to establish such a guideline; they are free, if they wish, to adopt it on their own." *McNeil v. Wisconsin*, 501 U.S. at 181-82..

Moreover, to the extent that the Government's argument rests on the supposed popularity of the *Miranda* rules, it takes the extremely odd position that the Court should be the arbiter and enforcer of the public will – in contravention of a statute duly enacted by the Congress, which is directly accountable to the public at the ballot box. This simply is not the way the separation of powers works in a representative democracy. Nothing is lost to self-government by upholding the statute. To the extent the public may actually favor the continuation of *Miranda*-like procedures, or the adoption of any alternative interrogation procedures that are consistent with constitutional protections, the lawmakers and administrators who depend on the public's approval for their continued tenure in office will take account of those preferences. Indeed, it is the invalidation of Section 3501 that would do serious harm to democracy by foreclosing the possibility of doing *anything* other than clinging to *Miranda*, regardless of what the public may wish.

There is also nothing to the claim that striking down Section 3501 is necessary in order to maintain public confidence in the Court. At a practical level, the Court's rulings have been obeyed throughout history, come what may. A decision one way or the other in this case will have no effect on that.

If, on the other hand, the relevant concern is some spiritual or symbolic desirability of maintaining public confidence in the Court, this consideration also favors upholding the statute. Members of the public who know something about the issue presumably would find it odd if the Court held unconstitutional a statute which requires nothing that the Constitution prohibits, and

would therefore feel less confidence that the Court observes the constitutional limits on its own powers.

The *Miranda* decision was not based on a sound interpretation of the Constitution. *See* U.S. Department of Justice, Office of Legal Policy, "Report to the Attorney General on the Law of Pretrial Interrogation" (1986), reprinted in 22 U. Mich. J.L. Ref. 479, 491-506 (1989). Obstinacy in maintaining the product of constitutional error could only serve to discredit the Court. Fidelity to the Constitution is the surest long-term guarantor of public confidence in the Court, and fidelity to the Constitution requires that Section 3501 be upheld. Section 3501 provides a legal, efficient and workable alternative to *Miranda*. This Act of Congress should be sustained.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Fourth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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